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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 43481
)	
v.)	ADA COUNTY NO. CR 2014-17445
)	
JIMMY CARLTON MOORE,)	REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE PATRICK H OWEN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jimmy Carlton Moore was convicted, following a jury trial, of one count of felony domestic battery and one count of misdemeanor resisting or obstructing law enforcement, and was found to be a persistent violator. On appeal, Mr. Moore contends that the district court erred when it admitted an audio recording of statements made in a conversation between Mr. Moore and his wife prior to the arrival of law enforcement, recorded after a surreptitiously placed 911 call. Mr. Moore asserts that the district court erred and abused its discretion when it admitted the exhibit because the 911 recording had very little relevance and was inflammatory, and any minimal probative value was substantially outweighed by the danger of unfair prejudice and was misleading to the jury.

Mr. Moore also asserts that the district court abused its discretion by awarding restitution because the State's request was not supported by substantial evidence.

A Reply Brief is necessary in this case to correct the State's erroneous reasoning that the fact that the audio recording of the 911 call was nearly inaudible "heightens the recording's relevance" because it "confirms that Ms. Powell accurately described concealing the phone, which in turn confirms the fearful state of mind that drove her actions." (Respondent's Brief, p.14.) However, Ms. Powell testified to these facts at trial, and a nearly inaudible recording of a conversation still has little to no relevance and likely misled, confused, and inflamed the jury.

Additionally, while the State agreed that "the restitution award in this case seems to erroneously include charges unrelated to the injuries Moore inflicted," it nevertheless

asks this Court to affirm the restitution award. (Respondent's Brief, pp.15, 20.) However, the proper relief is vacation of the restitution order because the State failed to demonstrate, by a preponderance of the evidence, that the medical expenses forming the basis for the award were the result of Mr. Moore's conduct.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Moore's Appellant's Brief. The entirety of the statement need not be repeated in this Reply Brief, but relevant facts and proceedings will be discussed as necessary herein.

ISSUES

1. Did the district court err when it admitted the 911 recording into evidence as the recording was only minimally relevant, and its prejudicial effect substantially outweighed its probative value?
2. Did the district court abuse its discretion when it ordered Mr. Moore to pay restitution for medical costs in the absence of substantial evidence to support such an award?

ARGUMENT

I.

The District Court Abused Its Discretion By Admitting The Statements Made In The Recorded 911 Call As The Statements Had Little Relevance, Were Misleading, And Were Far More Prejudicial Than Probative

The district court erred in admitting the recorded 911 call which documented the conversation between Mr. Moore and Ms. Powell prior to the arrival of law enforcement, because the 911 recording was nearly inaudible, was inflammatory, and any context for the remarks was missing. Further, because the content was only marginally relevant, the danger of misleading the jury was very high, and the statements were far more prejudicial than probative.

The State claims that Mr. Moore's tone of voice after the alleged incident "greatly disprove[s]" Mr. Moore's explanation that he was not upset when he hit Ms. Powell (Respondent's Brief, p.11); however, there was no testimony that Ms. Powell immediately called 911 after the alleged blow to her face. In fact, Ms. Powell testified, *inter alia*, that Mr. Moore struck her in the face; she lost consciousness for an unknown period of time; she went to lie down in the bed; approximately 15 minutes later Mr. Moore came in with another man who asked her a question; Mr. Moore then left with the man and later re-entered the bedroom to ask her to clean up a mess; and she left the bedroom and placed a call to 911 on her way to the living room. (Trial Tr., p.106, Ls.5-11; p.107, Ls.18-25; p.110, L.8 – p.111, L.11; p.123, Ls.10-24; p.126, L.1 – p.128, L.20; p.131, Ls.8-9.) Although there is not a concrete timeline to explain when these actions occurred, a conclusion consistent with Ms. Powell's trial testimony would be that she did not call 911 for 30-45 minutes or more after the incident. Further undercutting

the State's claim that Mr. Moore still had an angry state of mind that was continuing through the audio recording after the hit to Ms. Powell's face, is the fact that Mr. Moore left for approximately 15 minutes, and eventually came back to the apartment with another man, presumably the new neighbor. (Trial Tr., p.126, L.1 – p.128, L.17) Apparently, he was either running an errand or casually conversing with a neighbor (Trial Tr., p.365, L.2 – p.368, L.20), and such activities contradict the State's assertion that he was storming the apartment in an angry tirade and that his conversation with Ms. Powell, as recorded on the 911 call, was part of an ongoing angry interaction with Ms. Powell where she previously received the blow to her face.

The State did correctly note that Ms. Powell's credibility was a problem at trial. (Respondent's Brief, p.12.) Not only did the witnesses for the defense testify that Ms. Powell was not a truthful person, but her testimony during trial clearly demonstrated that Ms. Powell was not a reliable witness. She was extremely intoxicated that night, with a blood alcohol content of 0.27; however, she testified that they had been drinking all day, but she only drank two alcoholic beverages plus a couple pulls from a bottle of alcohol. (Trial Tr., p.124, Ls.7-20; p.200, Ls.12-16; p.206, Ls.21-25; p.243, L.13 – p.244, L.10.) Further, Ms. Powell told various inconsistent accounts of what happened with Mr. Moore. One story she told medical personnel was that she was asleep when she was dragged out of bed and punched in the face, but she denied saying that when questioned about it at trial. (Trial Tr., p.141, Ls.1-7; p.243, Ls.4-9.) Ms. Powell admitted several times that she did not remember what happened that evening—her memory was "still a little hazy." (Trial Tr., p.132, Ls.20-21; p.137, Ls.15-16.) Ultimately, the State is incorrect in claiming that the audio somehow corroborated Ms. Powell's

credibility where the audio was not recorded contemporaneously with the physical altercation, and does not tend to negate or support material facts at issue during the trial.

In claiming the audio recording is “highly probative,” the State greatly exaggerates the limited value of the recording. (Respondent’s Brief, p.12.) Mr. Moore’s angry tone of voice in a conversation that took place upwards of 30 minutes after the injury occurred was, at most, minimally relevant to whether the earlier incident was an accident or intentional. Further, Mr. Moore testified that he and Ms. Powell were arguing on the 911 recording (Trial Tr., p.370, L.13 – p.371, p.9)—whether he was angry at the time Ms. Powell was struck cannot be determined by Mr. Moore’s tone of voice 30-45 minutes later. The 911 audio recording does not “overwhelmingly support[] the state’s case” nor does it “greatly harm[]” Mr. Moore’s case, as the State contends. (Respondent’s Brief, p.12.) It merely served to confuse and/or mislead the jury by requiring them to guess at what was being said.

The State takes its argument too far. A difficult-to-hear, distorted audio does not constitute evidence that the phone was where Ms. Powell testified she had placed it—a fact the defense never contested—or heighten the recording’s relevance, or confirm that she accurately described concealing the phone, and that does not, “in turn confirm[] the fearful state of mind that drove her actions.” (Respondent’s Brief, p.14.) Ms. Powell testified that she was afraid (Trial Tr., p.130, L.2), there was no need to introduce the audio recording to verify her testimony. Further, testimony of how the call was placed would be the best evidence of that information, a difficult-to-hear recorded phone conversation is not indicative of a witness’s state of mind. Thus, admission of the

recorded 911 call was unnecessary and any probative value was vastly outweighed by I.R.E. 403 considerations of prejudice.

II.

The District Court Abused Its Discretion When It Ordered Mr. Moore To Pay Restitution For Medical Expenses In The Absence Of Substantial Evidence To Support Such An Award

On appeal, Mr. Moore asserts that the State failed to demonstrate by a preponderance of the evidence that the amount of money requested was part of the economic loss suffered by Ms. Powell as a result of Mr. Moore's criminal activity. Thus, the district court erred in ordering Mr. Moore to pay restitution. Mr. Moore may challenge the sufficiency of the State's evidence presented in support of its motion for restitution for the first time on appeal. See *State v. Yeoumans*, 144 Idaho 871, 873 (Ct. App. 2007) (holding that challenges to the sufficiency of evidence to meet a party's burden of proof may be articulated on appeal without a challenge below).

At the restitution hearing in Mr. Moore's case, the State asked the district court to order Medicare be reimbursed \$5,684.30 "related to injuries suffered by Patsy Powell on the date charged in the Complaint for which this defendant was found guilty." (9/30/15 Tr., p.8, Ls.15-19.) The prosecutor then elicited testimony from the restitution coordinator, Amber Schmidt, that the bills marked and admitted as State's Exhibit 1 (*hereinafter*, Restitution State's Exhibit 1) were the medical bills paid by Medicare for Ms. Powell's medical treatment a day or two after the incident. (9/30/15 Tr., p.12, L.20 – p.13, L.21.) The exhibit details Ms. Powell's medical expenses from November 29, 2014, through June 1, 2015. (Restitution State's Exhibit 1.) However, the district court

ordered restitution for Ms. Powell's medical expenses in the absence of substantial evidence to support such an award.

Notably, the restitution coordinator who testified did not have any first-hand knowledge of what expenses were specifically related to the battery. Although she testified that the exhibit was a printout of Medicaid's tabulation of all medical expenses incurred by Ms. Powell for a specific range of dates, there was no testimony or evidence presented that tied the medical expenses to the battery. The most certainty the restitution coordinator could offer to the prosecutor's questions attempting to link the records and restitution amounts to the incident were statements such as: "to the best of my ability" and "they appear to be." (9/30/15 Tr., p.13, L.10 - p.14, L.5.) This clearly was not a witness with sufficient knowledge of Ms. Powell's injuries or subsequent related medical expenses.

The State conceded that the "restitution award seems to erroneously include charged unrelated to the injuries that Moore inflicted." (Respondent's Brief, p.15.) Despite this concession, the State argues that Mr. Moore has "fail[ed] to show that the district court abused its discretion in ordering Moore to pay restitution." (Respondent's Brief, p.15.) The State argues that the restitution award should not be vacated but that the unrelated claims "could thus be excised from the district court award." (Respondent's Brief, p.20.) However, the State ultimately asks the Court to affirm the judgment and order of restitution. (Respondent's Brief, p.20.)

The restitution order must be vacated as the restitution order is erroneous where it is not supported by sufficient evidence. The burden of proof for any restitution award is on the State. Here, the State failed to establish, by a preponderance of the evidence,

that the amount requested was supported by substantial and competent evidence, and the district court erred by finding otherwise and awarding restitution. Since the State did not present substantial and competent evidence that the medical expenses paid by Medicare were the result of the criminal conduct, the restitution order is not based on sufficient evidence. As such, the restitution award should be vacated.

CONCLUSION

Mr. Moore respectfully requests that this Court vacate his convictions and remand to the district court for a new trial. Mr. Moore requests that the restitution award be vacated.

DATED this 1st day of July, 2016.

_____/s/
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of July, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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PATRICK H OWEN
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E-MAILED BRIEF

DAVID A STEWART
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CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas